

**Ballast Nedam Groep NV (M) Sdn Bhd v
Tradebond (M) Sdn Bhd**

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2-
24-126 OF 1999

ABDUL AZIZ J

29 FEBRUARY 2000

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Civil Procedure — Costs — Appeal as to costs — Additional costs incurred in arbitration proceedings due to postponement involving witnesses from overseas — Application for security for costs dismissed — Whether question of additional costs incurred in arbitration proceedings should be taken into account in deciding whether costs should be awarded

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Civil Procedure — Costs — Security for costs — Postponement requested by other party in arbitration proceedings — Costs would be incurred as it involved witnesses from overseas — Arbitrator directed party to apply for security for costs — Whether entitled for security for costs — Rules of the High Court 1980 O 23 r 1

In an arbitration proceeding where the respondent was the claimant against the appellant, the respondent intended to only called one witness. The respondent's witness tendered documents which were not made by him and the documents were ruled inadmissible. The proceedings were then subsequently postponed to the last day of hearing where the appellant's witnesses from Holland were to testify. The respondent applied for a further postponement to call more witnesses as the evidence adduced was hearsay. The appellant objected to the postponement as it would incur more cost on their part. The arbitrator adjourned the case sine die and directed that the appellant apply to court for security for costs. The senior assistant registrar dismissed the application for security for costs but refused to grant cost against the appellant. The appellant appealed against the dismissal of their application and the respondent appealed for costs. The appellant's application for security for costs was under O 23 r 1 of the Rules of the High Court 1980 ('the RHC') and it was contended that the respondent would not be able to pay the costs of the appellant.

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Held, dismissing the appellant's appeal and granting the respondent's appeal as to costs:

- (1) The appellant failed to show that his case fell under O 23 r 1(1)(a), (b), (c) or (d) of the RHC and despite the contention that the respondent would be unable to pay costs, the appellant failed to show that they were 'a nominal plaintiff' in the arbitration proceedings under r 1(1)(b). The respondent was thus not qualified under sub-r (1) to be ordered to give security for costs, and there was no question of considering whether, having regard to all the circumstances of the case, it was just to make the order (see p 420F-H); *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404, *Keary Developments Ltd v Tarmac*

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- A *Construction Ltd* [1995] 3 All ER 534 and *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [1998] 3 MLJ 820 distinguished.
- (2) The conduct which the respondent was blamed was their last-minute wish to call additional witnesses which led to the postponement of the arbitration proceedings and the application for security for costs. The question of the payment of costs which arose in this case however, was in relation to the application for security of costs. As such, the question of costs which the senior assistant registrar considered in respect of the arbitration proceedings was irrelevant (see p 421G–I).
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- C (3) The question of costs must be addressed on the basis that the appellant instituted the application for security for costs on their own free will because the arbitrator would not have had occasion to direct the appellant to apply for security for costs had the appellant's counsel not objected to the respondent's application for a postponement and cited costs as the ground for objection. Further, it had not been shown that the arbitrator had power to direct the appellant to apply for security for costs and that they were bound by the direction to apply for security for costs. The appellant applied their own mind to the direction and to all the circumstances, considered that it was in their interest to apply for security for costs. As the appellant had not shown valid grounds why they should not pay the costs of the proceedings before the senior assistant registrar they were ordered to pay the cost in the present appeal and the proceedings before the senior assistant registrar (see p 422A–D).
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[Bahasa Malaysia summary]

- Di dalam prosiding timbang tara di mana responden adalah pihak yang menuntut terhadap perayu, responden berniat hanya untuk memanggil seorang saksi. Saksi responden telah mengemukakan dokumen yang tidak dibuat olehnya dan dokumen-dokumen tersebut telah diputuskan sebagai tidak boleh diterima. Prosiding-prosiding tersebut kemudiannya ditangguhkan ke hari terakhir perbicaraan di mana saksi-saksi perayu dari Belanda akan memberikan keterangan. Responden memohon untuk penangguhan lanjutan untuk memanggil lebih banyak saksi-saksi oleh kerana keterangan yang dikemukakan adalah keterangan dengar cakap. Perayu telah membantah kepada penangguhan tersebut kerana in akan menyebabkan kos yang lebih banyak bagi pihak mereka. Penimbangtara telah menangguhkan kes secara sine die dan mengarahkan perayu memohon kepada mahkamah untuk jaminan kos. Penolong kanan pendaftar telah menolak permohonan untuk jaminan kos tetapi enggan memberikan kos terhadap perayu. Perayu telah merayu terhadap penolakan permohonan mereka dan responden merayu untuk kos. Permohonan
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perayu untuk jaminan kos adalah di bawah A 23 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan ia adalah ditegaskan bahawa responden tidak akan dapat membayar kos perayu tersebut.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan responden berkenaan dengan kos:

- (1) Perayu gagal untuk menunjukkan bahawa kesnya tergolong di bawah A 23 k 1(1) (a), (b), (c) atau (d) KMT dan walaupun penegasan bahawa responden tidak dapat membayar kos, perayu gagal untuk menunjukkan bahawa mereka adalah 'plaintif yang nominal' di dalam prosiding timbang tara di bawah k 1(1)(b). Dengan itu, responden tidak terjatuh di bawah kaedah kecil (1) untuk diarahkan untuk memberikan jaminan kos, dan tiada persoalan untuk dipertimbangkan sama ada, dengan melihat kepada semua keadaan-keadaan kes, adalah adil untuk membuat perintah tersebut (lihat ms 420F–H); *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404, *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 dan *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [1998] 3 MLJ 820 dibeza.
- (2) Kelakuan di mana responden dipersalahkan adalah keinginan mereka di saat-saat terakhir untuk memanggil saksi-saksi tambahan yang membawa kepada penangguhan prosiding-prosiding timbang tara dan permohonan untuk jaminan kos. Namun, persoalan pembayaran kos yang timbul di dalam kes ini adalah berkaitan dengan permohonan untuk jaminan kos. Oleh yang demikian, persoalan kos di mana penolong kanan pendaftar telah pertimbangkan adalah tidak berkaitan (lihat ms 421G–I).
- (3) Persoalan kos mestilah ditangani berdasarkan bahawa perayu telah memulakan permohonan jaminan kos di atas keinginan mereka sendiri kerana penimbangtara tidak akan berpeluang untuk mengarahkan perayu untuk memohon jaminan kos jika peguam perayu tidak membantah permohonan responden untuk penangguhan dan menyatakan kos sebagai alasan untuk bantahan. Selanjutnya, belum dibuktikan bahawa penimbang tara mempunyai kuasa untuk mengarahkan perayu untuk memohon jaminan kos dan mereka adalah diikat dengan arahan untuk memohon jaminan kos. Perayu sendiri telah membuat pertimbangan mengenai arahan tersebut dan kepada semua keadaan-keadaan, dan menganggap bahawa ia adalah atas kepentingan terbaik mereka untuk memohon jaminan kos. Oleh kerana perayu tidak menunjukkan alasan sah mengapa mereka tidak patut membayar kos prosiding di hadapan penolong kanan pendaftar, mereka diarahkan untuk membayar rayuan ini dan prosiding-prosiding di hadapan penolong kanan pendaftar tersebut (lihat ms 422A–D).]

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A Notes

For cases on appeal as to costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1189–1190.

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1369.

B**Cases referred to**

Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404 (distsd)

Government of Sarawak v Sami Mousawi-Utama Sdn Bhd [1998] 3 MLJ 820 (distsd)

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Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 (distsd)

Kishen Singh & Sons v Lee Khyun Nyuk [1960–63] SCR 99 (refd)

Legislation referred to**D**

Companies Act 1965 s 351(1)

Companies Act 1985 [Eng] s 726(1)

Rules of the High Court 1980 O 23 r 1(1)(a), (b), (c), (d)

HK Teh (HK Teh & Assoc) for the appellant.

Eric Paulsen (Karpal Singh & Co) for the respondent.

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Abdul Aziz J: The respondents here ("Tradebond") are the claimants in a reference under an arbitration agreement and the applicants here ("Ballast Nedam") are the respondents in the reference.

At the commencement of the arbitration proceedings on 13 January 1999, Tradebond was known to intend to call only one witness. It turned out in that witness's examination-in-chief that his evidence consisted mostly of documents which were not made by the witness and the makers of which were not going to be called. On objection by Ballast Nedam's counsel, the learned arbitrator ruled the documents were inadmissible. When proceedings resumed on 25 March 1999 and Tradebond's witness was being cross-examined, the witness attempted to rely on the documents that had been ruled inadmissible. The proceedings were adjourned to 26 March 1999 at 12.30pm for the airing of the issue whether the witness could rely on those documents. But on the morning of the 26th, the solicitors for Tradebond made a written request for a postponement to the 27th of the hearing scheduled for the afternoon of the 26th, because counsel would be engaged in the High Court on that day. It being understood and accepted on both sides that, the 27th being the last day fixed for the hearing and one of Ballast Nedam's two witnesses and a litigation adviser of theirs had arranged to return to Holland on the night of the 27th, the recording of witnesses' testimonies would be concluded on the 27th, the learned arbitrator directed that the hearing be adjourned to the 27th for continuation until conclusion. But on that day counsel for Tradebond applied for a postponement to enable them to call more witnesses because their evidence so far had been mostly hearsay evidence. On counsel for

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Ballast Nedam's objecting to a postponement on the ground that it would entail additional costs of arbitration — for one thing, their witness and adviser would have to come again from Holland — the learned arbitrator adjourned the arbitral hearing sine die but made certain directions, one of which was that Ballast Nedam shall make application to the High Court for security for costs to be given by Tradebond.

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Ballast Nedam accordingly applied for security for costs. The learned senior assistant registrar dismissed the application but refused to order costs for Tradebond against Ballast Nedam. Hence the present appeals. Ballast Nedam is appealing against the dismissal of their application (encl 13). Tradebond is appealing as regards costs (encl 16).

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Ballast Nedam bases their application for security for costs on sub-r (1) of O 23 r 1 of the Rules of the High Court 1980. Sub-rule (1) provides as follows:

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Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court —

- (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
- (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or
- (c) subject to para (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
- (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

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It is clear that for a plaintiff to be liable to be ordered to give security for costs under sub-r (1), his case must fall under any one of paras (a), (b), (c) and (d). It is also clear that even though the case of a plaintiff falls under any one of those paragraphs, he is to be ordered to give security for costs only 'if, having regard to all the circumstances of the case, the court thinks it just to do so'.

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The case of Tradebond does not fall under any of the paragraphs. Although it is Ballast Nedam's contention that Tradebond will be unable to pay the costs of Ballast Nedam, Tradebond does not fall under para (b) because they are not 'a nominal plaintiff' in the arbitration proceedings. Tradebond was therefore, if I may so put it, not qualified under sub-r (1) to be ordered to give security for costs, and there is no question of considering whether, having regard to all the circumstances of the case, it is just to make the order.

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Learned counsel for Ballast Nedam, however, argues that, according to the authorities, security for costs should be ordered if it is just to do so having regard to all the circumstances of the case and a good portion of his written submission is devoted to showing the existence of such

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- A circumstances. He relies on three authorities. One is *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404, which was an application under sub-r (1) of O 23 r 1. That was a case, however, where the plaintiff's case fell under paras (a) and (c), and what Arifin Zakaria J was considering was whether the circumstances rendered it just to order security for costs. The case is not an authority for the proposition that a plaintiff's case need not fall under any of those paragraphs.
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The other two cases relied on by learned counsel for Ballast Nedam are *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 and *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [1998] 3 MLJ 820.

- C Those two cases are, however, not about security for costs under rules of court but under the companies statutes. In the former, it is under s 726(1) of the Companies Act 1985 of England, which is in these terms:

Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

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In the latter, it is under the corresponding s 351(1) of our Companies Act 1965. Those two cases might be useful in considering in an application made under O 23 r 1 whether it is just in the circumstances to order security for costs, but they cannot be used as authority for contending that, in such an application, it is not necessary for the plaintiff's case to fall under any of the paragraphs of sub-r (1).

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Ballast Nedam's application was rightly dismissed. I dismiss their appeal with costs.

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As regards costs of the proceedings before the learned senior assistant registrar, two reasons appear to be advanced by learned counsel for Tradebond as to why they should not be ordered to pay costs. One reason places reliance on the decision of the Supreme Court, Sarawak, North Borneo and Brunei in *Kishen Singh & Sons v Lee Khyun Nyuk* [1960-63]

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SCR 99 that, to quote from the headnote, 'a successful litigant should not be deprived of his costs unless he has been guilty of some misconduct or other conduct calculated to induce unnecessary litigation'. The conduct for which Tradebond is blamed in the argument as to costs is their last-minute wish to call additional witnesses which led to the postponement of the arbitration proceedings and the application for security for costs. I think the

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conduct intended by that decision is conduct relating to the particular litigation in respect of which the question of costs arises, and not any other litigation. In the present case, to apply that decision one must look at conduct in relation to the application for security of costs which was made by the originating summons in this case. That is the litigation in respect of which the question of costs arose before the learned senior assistant registrar. In the application of that decision to the question of costs before

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the learned senior assistant registrar, conduct in respect of the arbitration proceedings is irrelevant.

The second reason advanced by learned counsel for Tradebond is that it was on the direction of the learned arbitrator that Tradebond made the application for security for costs. I must decide the question of costs on the basis that Ballast Nedam instituted this security for costs litigation of their own free will because, in the first place, the learned arbitrator, it seems to me, would not have had occasion to direct Ballast Nedam to apply for security for costs had their counsel not objected to Tradebond's application for a postponement and cited costs as the ground for objection, and, in the second place, it has not been shown that the learned arbitrator had power to direct that Ballast Nedam apply for security for costs and that, therefore, they were bound by the direction to apply for security for costs. I must approach the appeal on the basis that Ballast Nedam, applying their own mind to the direction and to all the circumstances, considered that it was in their interest in any event to apply for security for costs.

Ballast Nedam has not shown valid grounds why they should not pay the costs of the proceedings before the learned senior assistant registrar. I allow Tradebond's appeal with costs and order that Ballast Nedam pay Tradebond's costs of the proceedings before the learned senior assistant registrar.

Order accordingly.

Reported by Chin En Tek

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